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Supreme Court of the United States

OCTOBER TERM, 1931

No. 311

ST. PAUL FIRE & MARINE INSURANCE COMPANY, A CORPORATION, PETITIONER,

V.

SOPHIA C. BACHMANN, Respondent.

BRIEF FOR RESPONDENT.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Fourth Circuit.

CARL G. BACHMANN,
CHAS. J. SCHUCK,
W. C. GRIMES,
J. BERNARD HANDLAN,
Wheeling, W. Va.
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Wheeling, W. Va.
Counsel for Respondent.

THE OPINION OF THE CIRCUIT COURT OF APPEALS.

The opinion of the Circuit Court of Appeals for the Fourth Circuit was filed on April 15, 1931, and is

found at pages 176 to 180 of the Record. The opinion is officially reported in 49 Fed. (2nd) 158. No additional opinion was handed down with the order denying the rehearing.

EXPLANATORY.

For convenience and brevity, St. Paul Fire and Marine Insurance Company, a corporation, petitioner, is referred to as "petitioner," and Sophia C. Bachmann, respondent, as "respondent."

PROCEEDINGS HAD IN THE DISTRICT COURT

This case came on for trial in the District Court on plaintiff's declaration filed in said Court, May 25, 1926, which declaration is set out in full (R. 1). Thereupon, defendant in United States District Court filed the general issue plea and plaintiff joined therein (R. 11) and the defendant below, petitioner in this Court, tendered its specifications of defense on August 2, 1926 (R. 11).

The specifications of defense tendered by defendant below set up what petitioner refers to as the "Increase of Hazard Warranty" (R. 12) and the "Prohibited Articles Warranty" (R. 13), and also warranty against concealing or misrepresenting any material fact or circumstances concerning the insurance (R. 14). The last mentioned defense was withdrawn by petitioner in Court below (R. 17).

The petitioner, defendant in the Court below, sets up the specifications of defense as follows:

I

"The policy upon which this action is based contains the following condition and warranty:

" 'Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring (b) while the hazard is increased by any means within the control or knowledge of the insured.'

"The defendant says that at and before the time of the fire complained of, the fire hazard upon the insured building was greatly increased by divers means within the knowledge and control of the plaintiff and her agent or agents, and in at least three separate and distinct particulars, each and all of which, both separately and as a whole, constituted a violation of the above quoted condition and warranty, as herein below set forth, to-wit:

"(a) Some time prior to said fire, to-wit, about the first day of November, 1925, the insured building was leased by the plaintiff, through her duly authorized agent or agents, to one Bill Varisca, for a certain term, to-wit, eighteen months; that at the time of the fire, and prior therto, said Bill Varisca and some associates were operating upon and about the insured premises one or more moonshine stills for the manufacture of intoxicating liquors; that the operation of said stills upon said premises was in express violation of the prohibition and other laws of the United States, as well as of the State of West Virginia, and thereby subjected the said Bill Varisca and his associates, in case of discovery, to the danger of heavy fines and imprisonment; that in order to avoid detection and arrest, the parties operating said stills had to carry on their activities in and about said premises in a surreptitious and guarded manner, and for the most

part during the night time, with the result, among other things, that in case of an outbreak of fire, the usual and proper methods for giving warning thereof, and for the extinguishment of the same, could not and would not be used by the said occupants of the building; and that, in many other ways, said unlawful, illegal, and criminal use of the insured premises created a constant and material increase in the fire hazard thereto, and caused or contributed to the fire complained of herein, all of which was then and there known to the plaintiff and her agent or agents.

"(b) The defendant further says that the moonshine still or stills aforesaid were in themselves highly dangerous instrumentalities, on account of the inflammable, combustible, and explosive substances used in and about their operation; that especially the operation of said stills carried with it the constant danger of an explosion and fire resulting therefrom; and that the fire hazard to the insured building was greatly increased thereby, and in fact caused or contributed to the fire herein complained of, all of which facts were within the knowledge and control of the plaintiff and her agent or agents.

"(c) In connection with the operation of said moonshine still or stills, said Bill Varisca and his associates necessarily used large quantities of gasoline, mash, and other highly combustible, inflammable, and explosive substances, as well as open and unprotected flames and fires, all of which greatly increased the fire hazard to the insured building, and directly caused or contributed to the fire of which the plaintiff complains in this action. The defendant further says that the plaintiff, and her agent or agents had knowledge and control of such increased hazard at and before the time of the fire."

II

"The following condition and warranty is also found in said policy:

" 'Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) while illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed on the described premises fire works, greek fire, phosphorous, explosives, benzine, gasoline, naphtha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding 25 pounds, or kerosene oil exceeding five barrels.'

"The defendant says that at the time of the fire complained of, and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff and her agent or agents, and was in violation of the foregoing condition and warranty."

The first above mentioned warranty in specifications of defense, relates to what is known as the "Increase of Hazard Warranty." The petitioner does not claim any errors in the Court below with reference to proof nor instructions given relating to this warranty as contained in the original policy. The second specification of defense relates to what the petitioner terms "Prohibited Articles Warranty." Since warranty relating to concealment or misrepresentation of material facts was withdrawn by defendant below, we have not set it out. To the above specification of defense, the plaintiff be-

low, on the day of the trial joined issue and filed its reply thereto (R. 15), which reply is as follows:

No. 1.

"Plaintiff answering defendant's Specifications of Defense No. 1 (a), No. 1 (b) and No. 1 (c) for answer says, that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said Specifications; that neither she nor her agent or agents had any knowledge or control of, over or concerning any of said facts, charges and allegations. Plaintiff replying further says that added and attached to and made a part of the policy of insurance sued upon herein is a certain agreement in writing (commonly called a rider) which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is of the following tenor:

FORM NO. 4
Sustituted Form
Mercantile Building under Protection
(Standard Form W. Va. Fire Underwriters' Association)

"$4,000.00 on three story brick building, with approved roof and its additions adjoining and communicating, occupied for bottling Automobile Oils, Offices and other Mercantile purposes not more hazardous, including foundations; partitions, vaults and fittings, fire doors, elevators and their appurtenances; engines, boilers, pumps, their settings and appurtenances; heating, lighting and ventilating equipment; piping and plumbing of every description and electrical equipment for lighting and elevator service, and on all per-

manent fixtures thereon, situate at No. 1312 Main Street, Wheeling, W. Va.

Privileges Granted: To keep for sale not to exceed fifty pounds of gun powder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than 10 feet from artificial light, except incandescent electric light; for other insurance without notice until required; to be vacant not exceeding sixty (60) consecutive days; to be unoccupied not exceeding sixty (60) consecutive days; to make ordinary alterations and repairs in the within described premises, but this shall not be held to include the reconstruction or the enlargement of the same, and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein, or adjacent, and such alterations; to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or adjacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions; and for present and other occupancies not more hazardous and to do such work and to keep and use such materials as are usual in such occupancies. . . . . ."

And for further answer and reply to said specification No. 1 (a), No. 1 (b) and No. 1 (c) the said plaintiff joins issue thereon.

No. 2.

For answer to the defendant's Specification of Defense No. 2, plaintiff says that neither she nor her agent or agents had any knowledge of the

facts, charges and allegations set out in said specification; that neither she nor her agent or agents had any knowledge or control of over or concerning said facts, charges and allegations nor of any increased hazard at or before the time of the fire. Plaintiff replying further says that added and attached to and made part of the policy of insurance sued upon herein is that certain agreement in writing (commonly called the rider), which was executed by the said defendant or its authorized agent and attached to and made part of said policy and which is set out in extenso in plaintiff's answer to Specification No. 1 (a), 1 (b) and 1 (c) and which is here referred to and by reference thereto is made part hereof.

Plaintiff says further that prior to and to ascertain the condition and contents of said insured premises and property with specific and particular reference to the advisability of executing and attaching said rider to said policy that the defendant's duly authorized agent went upon and inspected said insured premises and the contents thereof and was fully apprised and advised as to the condition of said premises and of said contents, materials and supplies and of the nature and of the business which was then being carried on therein and thereon.

And for further answer and reply to said Specifications of Defense No. 2, the said plaintiff joins issue thereon.

"And so the plaintiff says that by reason of the matters and things answered, replied and alleged by the said plaintiff to the said various Specifications of Defense filed by the said defendant and each and all of them the said policy sued upon has not been rendered null and void, but that on the

contrary the liability of the said defendant has not been affected or lessened but that the said plaintiff has a right to recover in this action.

Sophia C. Bachmann, by Counsel,
Carl G. Bachmann and Handlan,
Garden and Matthews, Attorneys
for Sophia C. Bachmann."

On November 7, 1929, plaintiff and defendant joined issue on plaintiff's answer in reply to said specifications of defense Nos. I and II and on the general issue plea. On said issues, the jury found for the plaintiff (R. 20) and final judgment order was entered in United States District Court on November 13, 1929. (R. 20.)

RESTATEMENT OF THE CASE.

The statement of the case as contained in brief for petitioner under the heading "Summary of the Case" beginning petitioner's brief, page 2, contains so many misstatements of facts and unwarranted conclusions that we deem it necessary to make a partial re-summary or restatement of the case.

Under paragraph II, page 3, petitioner's brief, petitioner states that the important question before the Circuit Court of Appeals, raised by the petitioner, to be as follows:

"Where there is attached to the New York standard form of fire insurance policy containing a 'Prohibited Articles Warranty' that is, a warranty providing for a forfeiture of the policy if gasoline or other dangerous articles are kept or used on the insured premises) a 'rider' or 'permit' providing that gasoline might be

used on the premises in connection with the occupancy thereof for certain specified mercantile purposes, does such 'permit' automatically eliminate gasoline entirely from the Prohibited Articles Warranty so that thereafter large quantities thereof may be stored and used in the insured building as fuel for the operation of a tenant's moonshine stills, without forfeiting the policy?"

There is no provision in the policy as assumed by Counsel for petitioner, for forfeiture of the policy in any event. The policy provides not for a forfeiture but for a suspension of liability while explosives or gasoline and other substances are kept, used or allowed on the insured premises. This provision is as follows: "Unless otherwise provided by agreement in writing added thereto, this company shall not be liable for loss or damage occurring. . . .

(d) "While illuminating gas or vapor is generated, on the described premises; or while (any usage or custom to the contrary notwithstanding) there is kept, used or allowed, on the described premises: fireworks, greek fire, . . . gasoline . . . .". (R. 7.) This is what the petitioner terms the "Prohibited Articles Warranty" as contained in the original policy. It will be noted that in no event is there a forfeiture of the policy provided for. The prohibited use of these articles was afterward changed by the "Rider" above set out (R. 3) and the construction of the "Work and Material Clause" (R. 89) as construed in the Handbook of Rules, Forms and Deposits required by the West Virginia Fire Underwriters Association and the West Virginia Inspection Bureau (R. 88, 89). The Handbook of Rules referred to provides that the granting of a

policy when kept and used for such purposes as hazardous and to do such work and to keep and use such materials as are usual in such occupancies that, "Note:—It is understood that the word 'Materials' as used above includes gasoline and such other materials as are prohibited by the printed conditions of the policy when kept and used for such purposes as are usual to the occupancies permitted."

The above question said to be the important question before the Circuit Court of Appeals and raised in this Court, is not the question raised on the pleadings and the issues joined thereon in the United States District Court nor the issue that was presented to the United States Circuit Court of Appeals (See Appellee's Brief filed by respondent in United States Circuit Court of Appeals, pages 50-61).

The petitioner filed its specifications of defense, hereinbefore set out (R. 12) in which specifications of defense the petitioner alleges, with reference to the alleged "Prohibited Articles Warranty" that, at the time of the fire complained of and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the respondent and her agent or agents and was in violation of the conditions and warranty as contained in said alleged "Prohibited Articles Warranty". This was evidently the interpretation placed upon the clause found in the original policy as amended by what is known as the "Rider" by the petitioner itself in the lower Court. After petitioner failed to prove that the keeping of gasoline, explosives, mash and other highly combustible and inflammable substances

in large quantities was "well known" to the respondent and her agent or agents and was therefore in violation of what petitioner terms the "Prohibited Articles Warranty" and the "Rider" attached thereto, it asked the Court to grant instructions, contrary to the issues raised by its pleadings, the refusal of which it now complains and likewise objected to the instructions given in behalf of the respondent abou which it now complains. Petitioner clearly shifted its position after its failure to prove the allegations that it made with reference to the keeping of gasoline being well known to the respondent or her agents. The first important question presented, as respondent views the matter is: The petitioner, defendant in the District Court, having alleged in its specification of defense that the violation of what petitioner terms the "Prohibited Articles Warranty" was well known to the respondent and her agent or agents and was in violation of alleged "Prohibited Articles Warranty," on which issue was joined was it bound to prove the alleged violation of said warranty to be well known to the respondent and her agent or agents?

Under paragraph III (1) petitioner's brief, P. 3, petitioner summarizes the material provisions of the insurance policy as originally issued, and on page 6 of petitioner's brief under paragraph III (2), petitioner summarizes the effect of the "Rider" or permit added to the original policy and in so doing petitioner assumes at all times in referring to said "Rider" both in its summarization of the argument and its argument, that the privilege granted by the "Rider" permitting the use of the building for bottling of automobile oils, offices and other mercantile purposes not more hazardous, to be more hazardous than the operation of stills. This

question was determined by the jury in favor of respondent.

Petitioner also assumes that from the evidence of Ira P. Huff (R. 125), that the use of "some gasoline" for bottling automobile oils which was being used when petitioner's agents examined the premises was more hazardous than the use of gasoline as fuel and therefore the use of gasoline as fuel was not included in the privileges granted to use gasoline (Petitioner's brief, p. 10, 11). The original policy provides that there shall be no increase of hazard to the knowledge of the insured. This question was determined by the jury in favor of insured.

Under paragraph III (6), petitioner's brief, p. 13, petitioner states that two issues were raised by the pleadings and evidence in the trial in the District Court.

(a) That the keeping and using of gasoline in the insured building for the operation of the tenant's moonshine stills, constitute a clear violation of the "Prohibited Articles Warranty" in the policy irrespective of whether respondent or her agent had any control or knowledge of the tenant's acts.

(b) That the presence and operation of the moonshine stills in the insured building (irrespective of whether gasoline was used in connection therewith) constituted an increase of the fire hazard to the premises in violation of the Increase of Hazard Warranty.

As above shown a reference to respondent's specifications of defense which sets up what petitioner terms the "Prohibited Articles Warranty" (Specifications of Defense, R. 13) the issue was not so narrow as now asserted by petitioner and such an interpretation was not placed upon said alleged "Prohibited Articles Warranty" on the trial of this case. Respondent then al-

leged that, at the time of the fire complained of, and prior thereto large quantities of gasoline, explosive, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises, "all of which was well known to the plaintiff and her agent or agents and was in violation of the foregoing condition and warranty." (Reference to said foregoing condition and warranty is to the alleged "Prohibited Articles Warranty" R. p. 14.)

Counsel for petitioner in their brief, page 16, set out Plaintiff's Instruction No. 2, about which petitioner now complains, which instruction as appears from the Record uses the exact words of the petitioner in its specifications of defense, that is, the keeping, using and allowing of gasoline "was well known" to the respondent and her agent.

We desire to further call the attention of the Court to the fact that in the Spring of 1925, while the building was under lease to a tenant by the name of Huff, who was engaged in the business of manufacturing and bottling of automobile oils, the respondent, through her agent advised the petitioner that gasoline and oils were being used in the building. The respondent by its agent inspected the premises and attached to the policy as a "substituted form" the rider or endorsement above referred to. (R. 3, 4.)

Before this rider was attached the occupancy clause in the original policy read as follows:

> "$4,000.00 on four story brick building . . . occupied as produce store, . . . situate at 1312 Main Street, Wheeling, West Virginia." (R. p. 5.)

The rider contained the following occupancy clause:

"$4,000.00 on three story brick building . . . occupied for BOTTLING AUTOMOBILE OILS, offices AND OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS . . . situate at 1312 Main Street, Wheeling, W. Va." R. p. 3.) (Caps ours.)"

SUMMARY OF ARGUMENT.

I

The petitioner is bound to prove its specification of defense substantially as alleged on which issue was joined. It set up in its specifications of defense alleging that it relied on what it terms the "Increase of Hazard Warranty" and the "Prohibited Articles Warranty" and in connection with both of these specifications of defense, it alleged that the violation of said warranties were well known to both the respondent and her agent. Having placed such an interpretation on its contract of insurance on the trial of the case and issue having been joined thereon, petitioner is estopped from taking a position which is inconsistent with the one assumed in the course of the trial. Petitioner is bound to prove the breach of warranty set up by it in the manner alleged.

10 R. C. L. page 699, Sec. 27.
22 C. J. 331.
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Logan v. Provident Savings Life Ass. Soc. of N. Y. 57 W. Va. 384, 390.
Chambers v. Northwestern Ins. Co., 64 Minn. 495.

26 C. J. 514, Section 721.
33 C. J. 108, Section 828.
14 R. C. L. 1084, Section 262.
McMaster v. New York Life Ins. Co., 90 Fed. 40, 99 Fed. (C.C.A.) 856.

II

The petitioner, defendant, in District Court, interpreted the "Prohibited Articles Warranty" contained in the original policy as changed by the "Rider" as requiring it, in order to show breach thereof, to prove that the keeping of gasoline was known to respondent or her agent, and so alleged in its specifications of defense No. II (R. p. 13). The case was tried on this issue. Petitioner should not be permitted to assume a different theory in the Circuit Court of Appeals or in this Court from that assumed in the trial Court.

San Juan Light, etc., Co. v. Requenna, 224 U. S. 89, 32 SCt. 399, 56 L. ed. 680;
Melton v. Pensacola Bank, etc., Co., 190 Fed. 126, 111 CCA 166;
Brockenbrough v. Champion Fibre Co., 176 Fed. 840, 100 CCA 310;
General Fireproofing Co. v. Wallace, 175 Fed. 650, 99 CCA 204;
Richmond v. Oregon R., etc., Co. 137 Fed. 848, 70 CCA 378;
Baker v. Kaiser, 126 Fed. 317, 61 CCA 303;
Chicago, etc., R. Co. v. De Clow, 124 Fed. 142, 61 CCA 34;
Albany Perforated Wrapping-Paper Co. v. John Hoberg Co., 109 Fed. 589, 48 CCA 559 (infringement of trade-mark).

Thomas v. Taylor, 224 U. S. 73, 32 SCT 403, 56 L. ed. 673;

Texas etc., R. Co. v. Abilene Cotton Oil Co., 204 U. S. 426, 27 SCT 350, 51 L. ed. 553;

Basset v. Erickson Constr. Co., 213 Fed. 810, 130 CCA 468;

Mesa Market Co. v. Crosby, 174 Fed. 96, 98 CCA 70;

Bush v. Ralph Snyder, 100 W. Va. 464, 470, 130 S. E. 807;

Alford v. Kanawha etc., R. Co., 84 W. Va., 570, 100 S. E. 402.

10 R. C. L. p. 701 Section 28.

III

The "Rider" or permit attached to the original policy after the issuance thereof removed from the "Prohibited Articles Warranty Clause" the prohibition against the use of gasoline as contained in the original policy from the "Prohibited Article Warranty Clause" and placed the use of such gasoline within the "Hazardous Warranty Clause," under which latter clause, the petitioner is bound to show that the use of gasoline increased the hazard under the policy issued by the insurer.

This, the petitioner admits it failed to prove or at least it admits that the finding of the facts by the jury settled the question of fact as to whether or not the hazard was increased. (Petitioner's brief pp. 8, 14.)

IV

Petitioner assumes that the use of gasoline, if there were any such use being made at the time of the fire

in the operation of stills, was a greater hazard than the use of gasoline in the operation of bottling automobile oils or other occupancies of like nature. There is no evidence on which to base such an assumption. The mere fact that a business is unlawful does not necessarily involve a greater risk than the conducting of a lawful business.

V

It was not necessary for the "Rider" to include a permit to use gasoline for special purposes in order to make said permit cover any particular use thereof not more hazardous than the bottling of automobile oils or any other occupancies not more hazardous.

VI

The District Court did not err in granting instructions complained of on behalf of the respondent and in refusing to give instructions tendered by petitioner in view of the specifications of defense relied upon by petitioner in the lower Court and in view of the alteration of the original policy by the "Rider" attached thereto.

ARGUMENT.

(a) PETITIONER IS BOUND BY ISSUES JOINED IN TRIAL COURT

The petitioner in its specifications of defense No. 2 (R. 13, 14) in which it sets out the "Prohibited Articles Warranty" alleges that large quantities of gasoline were being used and allowed upon and about the in-

sured premises in violation of said warranty, all of which was well known to the respondent and her agent or agents. This was the interpretation placed upon the "Prohibited Articles Warranty" by the petitioner in the trial Court. Respondent joined issue on this specification of defense, and when the respondent showed the issuance of the policy; that the payments of the premiums had been regularly made up to the time of the fire, and that thereafter proof of the loss occasioned by said fire had been furnished to the Company as stipulated by the policy, then respondent made out a prima facie case. It was then up to the petitioner, if it relied upon a breach of warranty to void said policy and to release it from the payment thereof, to establish its case by a preponderance of the evidence.

> "When the plaintiff shows the issuance of the policy, that the payments of the premiums have been regularly made up to the time of the death of the assured, and that, after the death of the assured, proof of his death had been furnished to company as stipulated by the policy, then this makes a prima facie case, and if the defendant relies upon a breach of warranty or false representation to avoid said policy, and to release it from the payment thereof, it must establish its case by a preponderance of the testimony."
>
> Logan v. Provident Savings Life Ass. Soc. of N. Y., 57 W. Va. 384, 390.

The burden is on the petitioner to prove all matters of affirmative defense set up by it.

> 26 C. J. 514, Section 721.
> 33 C. J. 108, Section 828
> 14 R. C. L. 1084, Section 262.

McMaster v. New York Life Ins. Co., 90 Fed. 40, 99 Fed. (C.C.A.) 856.

Fountain v. Connecticut Fire Ins. Co., 117 Pac. 630.

Harrington v. Hanover Fire Ins. Co., 5 N. Y. S. 417.

St. Paul Fire & Marine Ins. Co. v. Kirkpatrick, 129 Tenn. 55, 164 S. W. 1186.

Hanley v. Aetna Ins. Co., 215 Mass. 425, 102 N. E. 641 Ann Case, 1914-D-53.

Rwy. Mail Assoc. v. Moore 15 Fed. (2-d) 547.

Section 64 of Chapter 125 of the Code of West Virginia, 1923, provides:

"To any declaration or count on a policy of insurance, whether the same be in the form prescribed by the sixty-first section of this chapter or not, and whether the action be covenant, debt or assumpsit the defendant may plead that he is not liable to the plaintiff as in said declaration is alleged. But if in any action on a policy of insurance, the defense be that the action can not be maintained because of failure to perform or comply with, or violation of any clause, condition or warranty in, upon or annexed to the policy or contained in or upon any paper which is made by reference a part of the policy, the defendant must file a statement in writing specifying by reference thereto, or otherwise, the particular clause, condition or warranty in respect to which such failure or violation is claimed to have occurred, and such statement must be verified by the oath of the defendant, his officer, agent or attorney-at-law, to the effect that the affiant believes the matter of defense therein stated will be supported by evidence at the trial."

The petitioner, complying with this provision of the State law alleges that respondent cannot maintain its action because of her failure to perform and comply with and her violation of certain clauses, conditions and warranties contained in the policy sued upon and petitioner specifies the particular clauses, conditions and warranties in respect to which such failures and violations are claimed to have occurred.

To permit petitioner after issue joined and proof taken, to now say that it does not need to prove its allegations, would be to permit it to mislead respondent and the trial Court and now take advantage of its own deception. Such attempts on the part of petitioner to shift its position in an appellate Court is contrary to well settled principles of law.

> "One of the most important results of the rule that questions which are not raised in the Court below cannot be raised in the appellate Court is that a party cannot, when a cause is brought up for appellate review, assume an attitude inconsistent with that taken by him at the trial, and that the parties are restricted to the theory on which the cause was prosecuted or defended in the Court below. Thus, where both parties act upon a particular theory of the cause of action, they will not be permitted to depart therefrom when the case is brought up for appellate review. And the same is true where the parties act upon a particular theory of defense or of opposition thereto."

3 C. J. p. 718-721 and cases there cited—

The special pleas or statements tendered in an action

on an insurance policy are in the nature of Bills of Particulars,

> Seyler vs. British American Assurance Co., 72 W. Va. 120, 77 S. E. 555; Indiana and Ohio Live Stock Insurance Co. 74 W. Va., 244, 81 S. E. 984.

Specifications of defense are notice to plaintiff of the defense that defendant will interpose.

"A direct, specific admission of a fact in a pleading is binding and conclusive on the party making it."

> Clarke vs. Clarke 70 W. Va. 428.

Petitioner, by alleging knowledge on the part of respondent or her agent, compelled respondent to reply thereto, which she did, denying said allegation on the part of petitioner.

> "The effect of a Bill of Particulars is to limit and restrain the plaintiff, on a trial, to the proof of the particular cause or causes of action, therein mentioned."

> 21 R. C. L., Page 482, Section 45.

citing:

> McKinnie v. Lane, 230 Ill. 544, 120 A. S. R. 338.

> "A Bill of Particulars is considered in some respects as an amplification of the declaration; and its object is to inform the defendant of the claim he is called on to defend against" (in the present

case to inform the plaintiff of the defenses that defendant would rely upon) "to effect its object, it must be as certain and convey as much information as a special declaration; and the same is true as to notice of special matters of defense."

21 R. C. L. 480, Section 43.

"A Bill of Particulars becomes evidence as an admission against the party delivering it on the trial of the issue to which it relates, and as such is proper for the consideration of the jury."

2 Ency. of Ev. 422,

citing:

Kenyon v. Wakes, 2 Mees. & W. 764; Lee v. Heath (N. J.), 39 Atl. 729.

"Proof must conform to a Bill of Particulars and pleadings to which they are adjunct."

Gilpin v. Howell, 5 P. St. 41, 45 Am. Dec. 720,
Commonwealth v. Snelling, 15 Pick (Mass.) 321,
Chicago etc., Railroad Co. v. Rovine, 61 Miss. 288,

"When a Bill of Particulars is furnished, it is deemed a part of the declaration, plea or notice to which it relates, and is construed in the same way as though it had been originally incorporated in it."

Starkweather v. Kittle, 17 Wend. (N. Y.) 20.

"A party will not be allowed to contradict his own Bill of Particulars in any material respect."

Hanson v. Smith, 94 Fed. 960.

"Proof must correspond substantially with the pleading of the party introducing it."

33 C. J. 102, Section 819,

Groves v. Boston Marine Ins. Co., 2 Cranch 419, 2 L. Ed. 324.
Catlett v. Pac. Ins. Co., 5 Fed. Cases No. 2517,
Simmons v. W. Va. Ins. Co. 8 W. Va. 474.

In an action on a policy on a frame dwelling house, the answer alleged that the assured used and occupied the building insured at the time he placed the policy, and afterwards as a boarding house and hotel, and that the policy was thereby rendered void. No change in the occupancy was alleged. Evidence that the building after the date of the policy was occupied as a hotel with the consent of the defendant was excluded as being different defense from the answer, and one requiring special pleading.

Pierce v. Cohasset Ins. Co., 123 Mass. 572, 573.

"Complying with the rule as in other cases, if there is a variance between the nature and elements of a cause of action as alleged and as proved, it is fatal. It is fatal if a variance exists between the proof and the defense alleged."

Phoenix Ins. Co. v. Lawrence, 81 Am. Dec. (Ky.) 521,

Provident Savings Life Assurance Society v. Bruett, 157 Ala. 540, 47 S. 1019,

New York Life Ins. Co. v. McPherson, 137 Ala. 116, 33 S. 825,

Penna. Mutual Aid Society v. Corley, 2 Penny. (Penna.) 398,

Bankers Loan Assoc. v. Liscow, 47 Neb. 340, 66 N. W. 412,

Needer v. Provident Savings Life Assurance Society, 58 App. Div. 80, 68 N. Y. S. 518.

See also Liverpool & London Ins. Co. v. Gunther, 116 U. S. 113, 126.

It is a rule of pleading that it is not enough to merely set out a statute or other writing claimed to have been breached but pleader must descend to particulars and show the manner in which it has been breached. This the petitioner did by alleging that large quantities of gasoline, explosives, mash and other highly combus tible and inflammable substances were being kept, used and allowed upon and about the insured premises, all of which was well known to the respondent and her agent or agents and was in violation of the warranty against the keeping, using and allowing gasoline in large quantities upon and about the insured premises. Petitioner in the Circuit Court of Appeals and in this Court now says that its defense based upon the alleged "Prohibited Article Warranty," was that if the tenant, Varisca, was keeping or using gasoline or any other prohibited article upon the premises, there could be no recovery upon the policy, even though the respondent, as owner of the building, knew nothing about the violation of the warranty. In view of the fact that p ti-

tioner attempted to prove that respondent's agent was upon the premises destroyed in order to show that he had knowledge of the operation of the stills and the presence of gasoline and in view of the further fact that petitioner alleged in specifications of defense that the presence of gasoline was well known to the respondent and her agent and also that the increase of hazard caused by the alleged operation of stills was known to the respondent and her agent, it is evident that petitioner did not contend in the trial of the case that there could be no recovery even though the respondent or her agent knew nothing about the violation of the warranty.

The first question, therefore, to be determined, is: Must petitioner prove its specifications of defense substantially as alleged? If so, then it is incumbent upon petitioner to prove knowledge on the part of respondent or her agent, both of the increase of hazard and that the presence of gasoline upon the insured premises prior to or at the time of the fire increased the hazard. It must be noted that respondent replied to petitioner's specifications of defense (R. 15) saying that neither she nor her agent or agents had any knowledge of the facts, charges and allegations set out in said specifications; that neither she nor her agent or agents had any knowledge or control over or concerning any of said facts, charges and allegations, on which issue was joined by petitioner without objection.

(b). PETITIONER IS BOUND BY THEORY ON WHICH CASE WAS TRIED IN TRIAL COURT.

The petitioner, in filing its specifications of defense, placed its own interpretation upon the "Prohibited

Articles Warranty" contained in the original policy as altered by the "Rider" herein set out, as requiring it in order to show breach thereof to prove that the keeping of gasoline was known to plaintiff or her agent. The case was tried on this issue and the trial Court based its instructions thereon. The petitioner, perceiving that it had failed to prove its specifications of defense as set up by the breach of the "Prohibited Articles Warranty" asked the trial Court to submit to the jury instructions contrary to its own interpretation of its insurance agreement as set up in said specifications of defense. And it maintained in the Circuit Court of Appeals and maintains in this Court that it is entitled to recover whether or not the respondent or her agent had knowledge of the keeping, storing and using of gasoline on the insured premises.

It is the general rule that where a party to an appeal has assumed an attitude in the lower court as to the theory of his case, or as to questions of law or fact upon which the theory of his case is based, he is estopped to assume any other or inconsistent position in the appellate Court, but must stand or fall on the theory which he first adopted.

Sutherland v. Sutherland 102 Ia. 535, 63 ASR 477 and note,

Tarbul v. Royal Ex. Shipping Co., 110 N. Y. 170, 6 A.S.K. 350,

Morrison v. Atkinson, 16 Oka. 571, 8 Ann. Cases 486 and note, 85 Pac. 472.

See Knoop v. Kelsey, 102 Mo. 291, 22 Ann. St. Reps. 777.

10 R. C. L. 701. Sec. 28.

San Juan Light etc. Co. v. Requenna 224 U. S. 89—32 S. C. T. 399.

Melton v. Pensacola Bank etc. Co. 190 Federal 126, 111 CCA 166.

Brockenbrough vs. Champion Fibre Co. 176 Fed. 840,—100 CCA 310.

(c) EFFECT OF "RIDER"

Even if we concede that petitioner is not bound to prove its specifications of defense substantially as alleged by it, still the petitioner cannot recover.

The insurance contract in so far as this case is concerned is narrowed down to the following provisions of the policy:

> "$4,000.00 on the three story brick building, ... occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS." (R. p. 3.) (Caps ours.)
>
> "And for present and other occupancies NOT MORE HAZARDOUS and to do such work and keep such materials as are usual in such occupancies." (R. p. 3.) (Caps ours.)
>
> "It is understood that the word 'materials' as used above, INCLUDES GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted". (R. p. 89.) (Caps ours.)
>
> "Unless otherwise provided by agreement in writing added hereto, this company shall not be liable for loss or damage occurring . . . (b) While the HAZARD IS INCREASED by any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED and (d) while . . . there is kept, used or allowed on the described

premises . . . . . gasoline . . . . . ." (R. p. 7) (Caps ours.)

Construing the above provisions as a whole the alleged "Prohibited Articles Warranty" means the following:

> The Company will not be liable if GASOLINE is kept, used and allowed on the insured premises; provided, however, that such forfeiture shall not occur if GASOLINE be kept, and used while the insured premises are being used for bottling automobile oils, offices, or other mercantile purposes NOT MORE HAZARDOUS or for present and other occupancies NOT MORE HAZARDOUS.

It is admitted by petitioner on page 8 of its brief that in substance the "Prohibited Articles Warranty" has been changed as herewith submitted, save and except, the petitioner does not include the following provision:

> "AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS" (R. p. 3.) (Caps ours.)

It is therefore respectfully submitted that the "Prohibited Articles Warranty" was so changed that the only way it could be effective would be when the insured building was occupied for a MORE HAZARDOUS PURPOSE than the bottling of automobile oils, offices and other mercantile purposes.

We think that the "Prohibited Articles Warranty" as thereby changed to be effective is solely dependent

upon an INCREASE OF THE FIRE HAZARD because it can only mean that

> GASOLINE could not be kept, used or allowed in any occupancy not more hazardous.

Consequently, if the "Prohibited Articles Warranty" as changed by the "Rider" is dependent upon an increase of the fire hazard we are then face to face with two inconsistencies and ambiguous provisions of the policy:

> First, The Company shall not be liable if gasoline shall be kept, used or allowed, provided however, the hazard is increased, and
>
> Second, If the hazard is increased by any means within the control or knowledge of the insured.

Both provisions relate to an increase of hazard and if, assuming for the purpose of argument, the hazard was increased by the tenant at the time of the fire, that increase of hazard had to be within the control or knowledge of the appellee.

Mr. Justice Sutherland in the case of Mutual Life Insurance Company of New York v. Hurni Packing Company, 263 U. S. 167, said:

> "The language employed is that of the company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

As in the present case, the petitioner employed the language contained in the policy, the rider and the

typewritten part of the occupancy clause contained in the rider. Is the petitioner now entitled to have these inconsistent provisions of the policy construed in a light favorable to it, or must it be held to the strict rule of construction, namely, that the meaning of its own words should be resolved against it?

We submit therefore that the holding of the U. S. Circuit Court of Appeals in this connection was correct.

There is no question but that the petitioner assumed the risk on the insured building which at the time the rider was attached to the policy was occupied and being used by a tenant who was using gasoline in the carrying on of his business of bottling automobile oils. This tenant could keep and use gasoline in unrestricted quantities or amounts. The rider did not restrict the amount. The agent for petitioner who inspected the premises saw and was advised gasoline was being used by the tenant. It was the intention of petitioner to continue the insurance on the building after this information came to it because it later prepared and attached to the policy the rider containing the occupancy clause which in so far as this occupancy was concerned negatived what is called the "prohibitive articles warranty" contained in the printed policy.

The petitioner; however, agreed not only to assume this risk of gasoline being kept and used in unrestricted quantities and amounts for the purpose of bottling automobile oils, but it agreed to assume the risk connected with any other mercantile purpose not more hazardous. In other words, petitioner assumed the

risk for any other purpose providing it was not more hazardous than bottling automobile oils. The wording of the occupancy clause in the rider is as follows:

> "occupied for bottling automobile oils, offices and OTHER MERCANTILE PURPOSES NOT MORE HAZARDOUS." (R. p. 3.) (Caps ours.)

The printed provision of the policy known as the "Prohibitive Articles Warranty" is as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring (d) While . . . there is kept, used or allowed on the described premises . . . gasoline . . ."

It can be readily seen that while the printed policy prohibited the keeping, using and allowing of gasoline, the occupancy clause in the rider was intended to and did permit it for any purpose not more hazardous than bottling automobile oils.

Several months after the rider was attached to the policy the tenant who was manufacturing automobile oils terminated his tenancy and the building was rented to a new tenant.

How far could this new tenant go in the use and occupancy of the insured building without violating the policy? Could he also manufacture automobile oils? Could he operate a still for the purpose of making distilled water to be used in his manufacturing process? If he could, such operation and the keeping and using of gasoline for that purpose would not be a violation of the policy. But it is claimed, and assuming for

the purpose of argument, that the tenant was operating stills for the purpose of making liquor at the time of the fire, and that certain quantities of gasoline were on the premises, if the tenant at the time of the fire could carry on the business of manufacturing automobile oils, then under the occupancy clause in the rider he could carry on any other business in the building, legal or illegal, providing its purpose was not more hazardous. Whether the keeping and using of gasoline for the purpose of operating stills, is more hazardous than the keeping and using of gasoline for the purpose of bottling automobile oils, is a question of fact. This fact was passed upon by the jury. Petitioner's Instruction No. 5 which was incorporated as part of the Court's charge to the jury, is as follows:

> "The court charges the jury that if you believe from the evidence that the fire hazard to said property was being increased as alleged in defendant's specification of defense, at and prior to the time of the fire complained of, by any means within the knowledge or control of the plaintiff, Sophia C. Bachmann or her husband, Charles F. Bachmann, INCLUDING ANY DANGEROUS USE OR OCCUPATION OF SAID BUILDING, which in your judgment increased the fire hazard in violation of the terms of plaintiff's policy, and that such increase in hazard, if any, caused or contributed to the fire and loss which occurred on the 27th day of December, 1925, then you must find for the defendant." (R. p. 150.) (Caps ours.)

The question as to whether the hazard was increased

during the last occupancy having been submitted to the jury and the jury having found for the respondent clearly the purpose for which the building was being used at the time of the fire was not more hazardous.

The jury having found that the use being made of the premises was not more hazardous than was permitted by the policy. The petitioner cannot now claim that the purpose for which the building was being used at the time of the fire was more hazardous.

It must be remembered the petitioner defended under two provisions of the policy as follows:

> "Unless otherwise provided by agreement in writing added hereto, this Company shall not be liable for loss or damage occurring:
>
> (b) While the hazard is increased by any means within the control or knowledge of the insured, or,
>
> (d) While . . . there is kept, used or allowed on the described premises . . . gasoline." (R. p. 7.)

Consequently it was the duty of the petitioner to prove first, that the hazard was increased within the knowledge and control of the insured. This it did not do. Whether or not the respondent or her agent had control or knowledge that the hazard had been increased by the operation of stills was a question of fact and the Judge submitted this question to the jury when he incorporated in his charge to the jury Plaintiff's Instruction No. 3, which was as follows:

> "The jury are charged by the Court that the fact alone that Bill Varisca either alone or with any associated may have operated liquor stills

upon the insured premises and that the fire which destroyed said premises was caused by or through the operation of said stills does not relieve the defendant insurance company from liability under its policy sued upon in this case but in order that the said insurance company may be so relieved it is incumbent upon said insurance company to prove to your satisfaction by a preponderence of the evidence that the said plaintiff, Sophia C. Bachmann, or her agent, Charles F. Bachmann had control or knowledge of the said liquor still operations and if said plaintiff and/or her said agent did not have such control or knowledge then notwithstanding the fact that said stills were so operated your verdict should be for the plaintiff." (R. p. 143.)

This question having been submitted to the jury and the jury having found that the fire hazard was not increased within the control or knowledge of the respondent, there can only be one conclusion and that is the petitioner failed to sustain the first grounds of its defense, namely that the hazard was increased within the control or knowledge of the respondent.

Second, it became the duty of the petitioner to prove its second ground of defense, namely, that gasoline was kept, used and allowed in the insured building. The evidence in so far as gasoline being found on the premises is concerned is very conflicting. Two prohibition officers who testified on behalf of the petitioner testified that they found a number of five-gallon cans containing gasoline on the first floor of the building the second day after the fire and that one or two of the compressor tanks connected with the stills also contained gasoline. This evidence was contradicted

by twenty-three witnesses who testified for the respondent and who all testified that they visited the building the day after the fire and one day before the prohibition officers said they found gasoline in the building. Many of these witnesses unqualifiedly testified there was no gasoline in the building; others, that they were in a position to see if any had been there, but did not see any. In addition to the above a number of the city firemen who attended the fire and two ex-chiefs of the Fire Department of the City of Wheeling who were present at the fire, all testified they did not see any gasoline and if there had been any there at the time of the fire it would have burned or exploded, and that the fire was so hot that if there were gasoline in the building it could not have stood the intense heat. Furthermore the jury could have found for the petitioner, if it believed gasoline was kept, used or allowed on the premises under "Plaintiff's Instruction No. 6" which the Court incorporated in the charge to the jury and which is as follows:

> "The jury are charged by the Court that the evidence and testimony in this case now before you gentlemen of the jury discloses and establishes that the Defendant company issued and delivered to the plaintiff, Sophia C. Bachmann, the policy of insurance sued on in this case; that Sophia C. Bachmann duly paid the premiums required therefore; that the said policy was in full force and effect upon December 27, 1925; that upon said last mentioned date, the said insured premises were completely destroyed by fire as the result of which the plaintiff sustained a loss not less than $3,784.49 the amount of said policy; that thereafter duly and seasonably the plaintiff made out

and filed with the defendant the required Proofs of Loss. Under these circumstances, you are charged by the Court that unless the defendant has proven by a preponderence of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased and/or THAT QUANTITIES OF GASOLINE WERE KEPT AND USED UPON SAID PREMISES your verdict shall be for the plaintiff." (R. p. 145.) (Caps ours.)

But the jury settled this question of fact by finding for the respondent. Consequently, the petitioner failed to prove its second ground of defense.

If the appellant failed to prove both grounds of its defense, which we submit it failed to do, and the jury having found for the respondent, then there can be no question but that the petitioner is liable.

PARTS OF INSURANCE CONTRACT INVOLVED

The Printed Policy

"Unless otherwise provided by agreement in writing added hereto this company shall not be liable for loss or damage occurring . . . .

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED, or

(d) . . . THERE IS KEPT, USED OR ALLOWED on the described premises . . . GASOLINE . . ." (Printed Policy.) (R. p. 7.) (Caps ours.)

The "Substituted Form" or Rider

"Four thousand dollars on three-story brick building . . . occupied for bottling automobile oils, offices and other mercantile purposes NOT MORE HAZARDOUS.

"Privileges Granted . . . AND FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such MATERIALS as are used in such occupancies." ("Substituted Form" or rider.) (R. p. 3, 4.) (Caps ours.)

Hand Book of Rules West Virginia Fire Underwriters Association

"Privilege . . . for PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies.

"Note: It is understood the word MATERIALS as used above, includes GASOLINE and such other materials as are prohibited by the printed conditions of the policy, when kept and used for such purposes as are usual to the occupancies permitted." (Hand Book of Rules West Virginia Fire Underwriters Association.) (R. p. 88, 89.) (Caps ours.)

When this substituted form or rider was added to the policy it entirely changed the printed provision of the policy known as the "Prohibited Articles Warranty" in so far as the keeping, using and allowing of gasoline was concerned, in that it permitted the keeping, using and allowing of those prohibited materials mentioned in the "Prohibited Articles Warranty" FOR THE PRESENT OR OTHER OCCUPANCIES NOT MORE HAZARDOUS; that is, it struck out

the printed provision (d) in the "Prohibited Articles Warranty" and read into the policy in its place, the right to keep, use and allow the MATERIALS needed, in unrestricted quantities or amounts for BOTTLING AUTOMOBILE OILS AND OTHER PURPOSES NOT MORE HAZARDOUS. There can be no doubt that it was the intention of the parties, particularly of the petitioner, to permit the keeping, using and allowing of the prohibited materials mentioned in section (d) "Prohibited Articles Warranty" for the purpose of bottling automobile oils and OTHER OCCUPANCIES NOT MORE HAZARDOUS when it attached this rider to the policy.

If the premises were to be occupied other than for bottling automobile oils, that occupancy was not to be MORE HAZARDOUS than bottling automobile oils, that is, it was not to be an occupancy which increased the fire hazard.

It must be remembered that under the rider OTHER OCCUPANCIES were permitted, so long as they were NOT MORE HAZARDOUS than the hazard incident to bottling automobile oils, that is, so long as the other occupancies did not increase the fire hazard.

The petitioner intended, when it attached this rider to the policy, that gasoline and other prohibited articles could be kept, used and allowed but the fire hazard should not be increased during other occupancies by any means within the knowledge and control of the insured.

The "Hand Book of Rules" required to be filed in the office of the Commissioner of Insurance of the State of West Virginia (R. p. 88) and in use by the West Virginia Fire Underwriters Association and which was

used by the fire insurance companies doing business in West Virginia in 1925, defines what the term MATERIALS means as used in the rider referred to. On page 73 of this book is found the following:

> "Privilege for present and OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 89.) (Caps ours.)

> "Note: It is understood that the word MATERIALS as used above, includes GASOLINE, and such other materials as are prohibited by the printed provisions of the policy when kept and used for such purposes as are usual to the occupancies permitted." (R. p. 88.) (Caps ours.)

The petitioner by its own interpretation of the word MATERIALS as used in the rider admits that it includes GASOLINE and the other prohibited materials mentioned in the printed provisions of the policy.

If it was the intention of the petitioner to free itself from liability providing prohibited materials were kept, used or allowed in occupancies that were more hazardous than permitted under the rider, then it should have stated in the rider that if any of the prohibited materials are kept, used or allowed in other occupancies that are more hazardous the Company would not be liable. This it did not do and it is very evident that it therefore relied upon the "Increase of Hazard Warranty" of the printed policy. (R. p. 7.)

That the rider completely changed the printed conditions of the policy there can be no doubt. A com-

parison of the provisions of the rider under PRIVILEGES GRANTED (R. p. 3) with the printed provisions of the policy (R. p. 7) will disclose just what was intended. The printed policy provides:

> "Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring
> (a) while the insured shall have any other contract of insurance, whether valid or not, on property covered, in whole or in part by this policy." (R. p. 7.)

The rider contains the following:

> "PRIVILEGES GRANTED . . . for other insurance without notice until required." (R. p. 3.)

Clearly the printed provision of the policy prohibited other insurance while the rider permitted additional insurance.

Again the printed provision of the policy provides:

> "(c) While mechanics are employed in building, altering or repairing the described premises beyond a period of fifteen days." (R. p. 7.)

The rider contains the following:

> "to make alterations, additions or repairs for sixty days at any one time and this policy (so far as it applies on building) shall also cover in accordance with the conditions of this policy all materials and supplies therefor, therein or ad-

jacent, and such alterations or additions and (so far as it applies on contents) shall extend to cover in such additions."

So here again the printed provision of the policy prohibited alterations and repairs beyond a period of fifteen days while the rider permitted alterations and repairs to be made for sixty days at any one time. (R. p. 3.)

Again the printed provision of the policy provides:

"(f) While a described building whether intended for occupancy by owner or tenant, is vacant or unoccupied beyond a period of ten days." (R. p. 7.)

The rider contains the following:

"to be vacant not exceeding sixty consecutive days; to be unoccupied not exceeding sixty consecutive days." (R. p. 3.)

Here again the printed provision of the policy prohibited the premises to be vacant or unoccupied for not more than ten days while the rider permitted it to be vacant and unoccupied for sixty consecutive days.

Again the printed provision of the policy provides:

"(d) While illuminating gas or vapor is generated on the described premises; or while (any usage or custom to the contrary not withstanding) there is kept, used or allowed on the described premises; fireworks, greek fire, phosphorous, explosives, benzine, GASOLINE, naph-

tha or any other petroleum product of greater inflammability than kerosene oil, gunpowder exceeding twenty-five pounds, or kerosene oil exceeding five barrels." (R. p. 7.) (Caps ours.)

The rider contains the following provision:

"To keep for sale not to exceed fifty pounds of gunpowder and ten barrels of kerosene oil, the latter to be drawn only by daylight, or at a distance of not less than ten feet from *artificial* light, except incandescent electric light . . . and FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS, and to do such work and to keep and use such MATERIALS as are usual in such occupancies." (R. p. 3.) (Caps ours.)

Here again section (d) has been completely changed.

It will be noted that the provisions of the printed policy, namely, sections (a), (c), (d) and (f), were all changed by the rider, while sections (b), (e) and (g), of the printed policy were not destroyed by the rider.

In other words, if the policy was redrafted in this connection, it would read substantially as follows:

"Unless otherwise provided by agreement in writing added hereto this Company shall not be liable for loss or damage occurring:

(b) WHILE THE HAZARD IS INCREASED BY ANY MEANS WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED; or

(e) If the subject of insurance be a manufacturing establishment while operated in whole or in part between the hours of ten P. M. and five

A. M. or while it ceased to be operated beyond a period of ten days; or

(g) By explosion or lightning, unless fire ensue, and, in that event, for loss or damage by fire only." (R. p. 7.)

WHEN THE RIDER IS ADDED TO THE ABOVE, THE POLICY IS COMPLETE.

The petitioner so construed the policy in this connection, because when we read its "Specifications of Defense" we find ITS OWN PLEADINGS alleges that the respondent or her agent WELL KNEW that GASOLINE, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon the insured premises.

Petitioner's "Specification of Defense No. 2" is as follows:

"The defense says that at the time of the fire complained of; and prior thereto, large quantities of gasoline, explosives, mash and other highly combustible and inflammable substances were being kept, used and allowed upon and about the insured premises ALL OF WHICH WAS WELL KNOWN TO THE PLAINTIFF AND HER AGENT OR AGENTS, and was in violation of the foregoing condition and warranty." (R. p. 14.) (Caps ours.)

The petitioner cannot now complain or have a construction placed upon the policy in this case which is favorable to it, in view of the fact that the petitioner itself is responsible for the wording contained in the policy.

There is abundance of authority holding that where doubts arise as to the proper construction of clauses in insurance contracts that view which is most favorable to the insured must be adopted.

In the case of Mutual Life Insurance Company of New York vs. Hurni Packing Company 263 U. S. 167, Mr. Justice Sutherland said:

> "The language employed is that of the Company and it is consistent with both reason and justice that any fair doubt as to the meaning of its own words should be resolved against it."

FIRST NATIONAL BANK v. HARTFORD INSURANCE CO. 95 U. S. 673, 678-679;

THOMPSON v. PHOENIX INSURANCE CO. 136 U. S. 287, 297;

IMPERIAL FIRE INSURANCE CO. v. COOS COUNTY 151 U. S. 452, 462.

> "An insurance policy will be construed in a manner most favorable to the insured."

MISSOURI STATE LIFE INSURANCE CO. v. GUESS. 17 Fed. (2) 450 AND CASES THERE CITED.

> "Courts do not favor forfeiture and where doubts arise will adopt construction of policy most favorable to insured and which will prevent annulment."

RAILWAY MAIL ASS'N v. MOORE. 15 Fed. (2) 547.

"It is well settled law that where doubts arise as to the proper construction of clauses in insurance contracts, that view of them must be adopted which is most favorable to the insured, and which will prevent a forfeiture of his rights under the policy. FORFEITURES ARE NEVER FAVORED BY THE COURTS." (Caps ours.)

BOOHER v. FARMERS' MUTUAL FIRE ASSOCIATION 91 W. Va. 468.

"Contracts of insurance are to be construed most strongly against the insurer and in favor of the insured."

SHINN v. W. VA. INS. CO. 104 W. Va. 353.

"If the language of a forfeiture clause in an insurance policy is susceptible of two constructions, the one more favorable to the insured is to be adopted."

BOLING v. CONTINENTAL INS. CO., 86 W. Va., 165.

In order to show that the hazard was increased by a greater use of gasoline, as a defense to the recovery by the respondent, the petitioner must, under the terms of the policy, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE respondent or her agent. This it failed to do.

It cannot be doubted that, under the rider, any other occupancy NOT MORE HAZARDOUS was permitted. That, undoubtedly, means any occupancy which did not increase the fire hazard. Therefore, the

policy and rider present two separate clauses relating to increase of hazard. One providing that:

> Gasoline shall not be kept, used or allowed in an occupany where the hazard is increased.

And the other providing that:

> If the HAZARD IS INCREASED BY ANY MEANS, it must be within the knowledge or control of the insured.

It is very readily apparent that these two provisions relate to an increase in the fire hazard. And if there was an increase in the fire hazard at the time of the fire by the tenant then occupying the building WHICH WAS NOT PROVEN in order to excuse the petitioner from liability, the petitioner must, under the terms of the policy and rider, bring that fact WITHIN THE KNOWLEDGE AND CONTROL OF THE INSURED. THIS WAS THE PETITIONER'S OWN CONTENTION AND POSITION IN THE TRIAL COURT as shown by its "Specification of Defense No. 2" herein referred to (R. p. 13).

Clearly whether or not the hazard was increased within the knowledge and control of the respondent, was a question of fact for the jury to decide and being a question of fact overwhelmingly supported by a preponderence of the testimony, the jury found for the respondent.

The Court in the case of ROYAL EXCHANGE ASSURANCE COMPANY v. THROWER (240 Fed. 811) said on page 816,

"It is this language 'WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED' that differentiates policies like this from many policies as to which it has been held that the act of the tenant is the act of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 816, Affirmed 246 Fed. 768.

The following is quoted from the opinion of the Court in the above case on pages 814, 815:

"That the insured ought to have known, must have known, should have known, is not enough. The insured must have knowledge of the particular use to which the building was being put by the tenant. The language is 'any means WITHIN THE CONTROL OR KNOWLEDGE OF THE INSURED.' To control the matter it would seem to be necessary that the insured should have had some knowledge of what was being done in the building. It does not seem that an owner can be held to the duty of controlling that of which he does not know. The duty to control involved, reasonably and fairly, some knowledge of the hazardous use of the building; otherwise the forfeiture would be worked simply because the insured was the owner of the building, and the people who caused the hazard were his tenants. The language of the policy would be given no effect, that the forfeiture should result from the increased hazard by means within the CONTROL OR KNOWLEDGE of the insured. There is abundant authority for holding that, where there was language like this in the

policy, the owner is not responsible for increase of the hazard by a tenant without the knowledge of the landlord." (Caps ours.)

ROYAL EXCHANGE ASSURANCE CO. v. THROWER, 240 Fed. 811, 814, 815. Affirmed 246 Fed. 768.

In the case of FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION, the Court held:

"Where owner of dwelling house rented building for dwelling house purposes without knowledge that tenant was operating a STILL therein POLICY OF FIRE INSURANCE COVERING BUILDING WAS NOT AVOIDED BECAUSE OF INCREASE OF HAZARD OR CHANGE OF OCCUPANCY BY REASON OF OPERATION OF STILL BY TENANT." (Caps ours.)

FAYLE v. CAMDEN FIRE INSURANCE ASSOCIATION 278 PAC. (MONT) 509 (June, 1929).

In the case of COLKER v. CONNECTICUT FIRE INSURANCE COMPANY the Court held:

". . . where the insured leased part of his building to a tenant FOR STORAGE PURPOSES, the insurer was not released from liability or loss through fire by fact that tenant, without knowledge or consent of insured, operated a still on premises; PROVISION FOR AVOIDING POLICY BECAUSE OF INCREASED HAZARD NOT RELIEVING INSURER FROM LIABILITY IN SUCH CASE." (Caps ours.)

COLKER v. CONN. F. INS. CO., 290 S. W. (Ky.) 1073.

In the case of RAGLEY v. NORTHWESTERN INSURANCE COMPANY the Court held:

". . . that where owners renting house insured for dwelling house purposes had no cause to believe that dwelling was used for manufacture of liquor THEY WOULD NOT BE CHARGEABLE WITH MANUFACTURE OF LIQUOR AT THE TIME OF FIRE, SO AS TO RENDER POLICY VOID, even though such manufacture was such as might, as against tenant, be regarded as one of the principal uses of the house." (Caps ours.)

RAGLEY v. NORTHWESTERN INS. CO., 276 Pac. (Wash.) 537.

(d) PETITIONER ASSUMES THAT THERE WAS AN INCREASE OF HAZARD.

Even if an unlawful business was being conducted on the premises still the respondent is not barred from recovery unless there is evidence to show that the fire hazard was increased to the knowledge or with the consent of the owner of said building. It is incumbent on petitioner to affirmatively prove that the increase of hazard made by tenant was with the consent or knowledge of the owner or her agent.

Merrill vs. Ins. Co. 23 Fed. 245.

The purpose of a provision in a fire policy defeating recovery because of increased hazard is because increased peril may cause fire, and if loss ensues from

cause foreign to increase of hazard, there is no casual connection between hazard and fire, and there can be no failure of recovery.

Northwestern Insurance Co. vs. Morris 165 N. E. (Ohio) 506.

The fact that the building was leased and the tenant, without the consent or knowledge of the insured, operated still on premises, does not relieve the insurer from liability in such a case.

Colker v. Conn. Fire Insurance Co., 290 S. W. (Ky.) 1073.

Ragley v. N. W. Ins. Co. 276 (Pac.) Wash. 537.

(e) RESPONDENT'S INSTRUCTIONS COMPLAINED OF.

"DEFENDANT'S INSTRUCTION NO. 8."

Petitioner particularly complains of part of respondent's instruction No. 8 (R. 146). which is as follows:

"You are also charged by the Court that unless the defendant has proven by a preponderance of the evidence that within the control or knowledge of the said plaintiff the fire hazard upon said premises was increased by the operation of a liquor still on the premises then your verdict shall be for the plaintiff since the defendant by the issuance of the rider described in the evidence as having been attached to the policy here sued on is estopped to avoid the policy because of the fact that quantities of gasoline were kept and used upon the premises since the said rider permitted the bottling of automobile oils which according to the un-

Contradicted evidence contained gasoline

The petitioner objects to the giving of this Instruction in its entirety, and assigns the following particular grounds as objections thereto:

1. Because it charged the jury that the said policy was in full force and effect upon December 27, 1925. (R. 161.)

2. Because it required the petitioner to prove control or knowledge on the part of respondent as to any moonshine stills or gasoline upon the insured premises. (R. 161.)

3. Because it charged the jury that the petitioner was estopped from avoiding liability on the policy because quantities of gasoline had been kept and used upon the premises following the issuance of the rider on the policy permitting the bottling of automobile oils. (R. 161.)

Petitioner's third objection involves an interpretation of the rider attached to said policy. This rider and its effect has been heretofore fully discussed. The evidence shows that the agent knew of use of gasoline when rider was issued.

The issuance of a policy with knowledge, actual or constructive, of the insured's use in his business of gasoline, contrary to a provision of the policy waives the prohibition.

4 Crouch on Ins. 3371.

Where the agent of a Fire Insurance Company, well knowing that petroleum oil is kept on the premises by the insured, makes out and delivers to him a policy containing a condition that the same shall be void if petroleum is kept on the premises, and receives premium

for the policy, his company is estopped from claiming that the policy is void for breach of the condition.

Kruger v. Western F. Ins. Co., 13 Pac. (Cal.) 156.

To the same effect see Faust v. Ins. Co., 64 N. W. (Wis.) 383; Globe v. Rutgers Fire Ins. Co., 113 N. E. (Ind.) 425; Fraim v. Fire Ins. Co., 32 Atl. (Pa.) 613, L. R. A. 1917—C, 284.

In view of instructions granted on behalf of the petitioner, to-wit, Instructions Nos. 2, 5 and 7, it is plain that the Court simply meant to say in this Instruction (and the jury could not have misunderstood the meaning of the Court), that the petitioner was estopped from avoiding the policy because of the fact that quantities of gasoline were kept and used upon the premises under what is known as the prohibited warranty contained in said policy under Clause (d), lines 44 to 51, inclusive. (R. 7.)

The Court, in granting "Defendant's Instruction No. 7" (R. 151) says that it is not incumbent upon the Insurance Company to prove beyond a reasonable doubt that the respondent or her husband, Charles F. Bachmann, had knowledge or notice of any condition prevailing in the insured building, as alleged in "Defendant's Specifications of Defense" at and prior to the time of the fire, which may have increased the fire hazard of the insured premises and in "Defendant's Instruction No. 5," (R. 150) the Court tells the jury that if they believe from the evidence that the fire hazard to said property was being increased as alleged in "Defendant's Specifications of Defense" by any means within the knowledge or control of the plaintiff, or her

husband, Charles F. Bachmann, including any dangerous use or occupany of the building which increased the fire hazard in violation of the terms of the respondent's policy, then they must find for the petitioner, and in "Defendant's Instruction No. 2" (R. 149) the Court tells the jury that if they believe that respondent's husband, Charles F. Bachmann, had knowledge or notice of the presence or use therein of any of the articles prohibited by the respondent's policy then such knowledge or notice should be imputed to the respondent, Sophia C. Bachmann.

Petitioner alleges in its "Specifications of Defense" that the use of gasoline did increase the fire hazard Paragraph (c). (R. p. 14.) Therefore, the jury were permitted to consider the presence and use of gasoline as increasing the fire hazard as contained in "Defendant's Instruction No. 5," granted by the Court.

The petitioner claims in its brief that the fire hazard was increased by reason of keeping gasoline for a purpose other than that permitted. If this be so, then under the terms of the policy, and under the allegations made by the petitioner in its specifications of defense, it is incumbent upon petitioner to show that respondent or her agent or agents had control or knowledge of such keeping of gasoline. This issue is fairly submitted to the jury by the instructions of the Court.

Let us assume for the sake of the argument that the Court gave a wrong reason in "Plaintiff's Instruction No. 8" as to estoppel of petitioner, still the instructions as a whole correctly state the issues and are based upon the evidence introduced at the trial of the case. Said instruction, therefore, is not prejudicial to the petitioner.

Petitioner in its brief page 16, sets out Plaintiff's Instructions No.2 (R. 142-3), Plaintiff's Instructions No. 4 (R. 144) and Plaintiff's Instructions No. 10 (R. 147). Petitioner's objection to these instructions is that they require petitioner to prove by a preponderence of the evidence that the keeping, using and allowing of gasoline, explosives, mash and other highly combustible substances was well known to the respondent or her agent. All of these instructions were based upon the issues raised by petitioner in its specifications of defense, and upon the interpretation of the effect of the "Rider" attached to the original policy permitting the use of gasoline as made by the petitioner when filing said specifications of defense. The Record does not disclose that any particular grounds of objection were made to any of these instructions at the time they were given to the jury.

This issue is fairly submitted to the jury by the instructions of the Court.

DEFENDANT'S INSTRUCTIONS NOS. 1, 1A, 1B, 1C, 3, 4 and 6 (R. 148-150). Refused.

Instruction No. 1 is bad because:

1. It would make the respondent liable for the acts of a wilful trespasser in temporarily taking gasoline upon the premises.

2. Said instruction is contrary to petitioner's specification of defense and would tell the jury that defendant below would not be liable even though plaintiff below or her husband, Charles F. Bachmann, had no actual knowledge of the presence of gasoline upon the insured premises.

3. Because it entirely ignores the provision contained in the "Rider" attached to the original policy and which permitted use of gasoline.

It is an elementary rule of law that instructions must be based upon the pleadings and evidence. Instructions must be applicable and limited to the issues raised by the pleading.

U. S. v. Dashiel, 4 Wall. 182, 185, 18 L. Ed. 319.

Union Pac. R. Co. v. James, 163 U. S. 486, 490, 41 L. Ed. 236.

Ins. Co. v. Piaggio, 16 Wall. 378, 21 L. Ed. 358.

Hom[illegible]enefit Assoc. v. Sargent, 142 U. S. 691, 700, 35[illegible] Ed. 1160.

Rio Grande Western R. Co. v. Leak, 163 U. S. 280, 287, 41 L. Ed. 160.

Unless the warranty clause so provides, the policy will not be forfeited by the act of a third person not under the control of the insured.

32 C. J. 1296, Section 526.

"The casual use of camphene and friction matches by workmen employed about the premises, without the knowledge of the insured, and contrary to his orders, is no violation of a proviso that they shall not be kept, used or sold. A use, to work a forfeiture must be a use known to and permitted by the insured."

1 May on Ins. (4th Ed.) Section 241, citing:

Farmers and Mechanics Ins. Co. v. Simmons, 30 Pa. St. 299.

White v. Mutual Fire Ins. Co., 8 Gray (Mass.) 566.

Sanford v. Mechanics Mutual Fire Ins. Co., 12 Cush. (Mass.) 541.

"The occasional use of articles denominated hazardous or the occupation of the premises insured for purposes called hazardous, in the conditions annexed to a policy will not avoid the policy if such use and occupation appertain to the general subject matter of the risk."

1 May on Ins. (4th Ed.) Section 241, citing:

Merchants & Manufacturers Ins. Co. v. Wash. Ins. Co. 1 Handy (Ohio) 181.

In view of the above authorities, the above instruction tendered by the defendant below, which entirely ignores the rider attached to the policy, makes the instruction bad, and the Court correctly refused it.

"At the date of the issue of a fire insurance policy, the premises were unoccupied. The printed part of the policy provided that it should become void if benzine, gasoline, etc., or other explosives should be kept or used on the premises. These were the only uses of premises prohibited by the policy as hazardous. A written slip, attached to and made a part of the policy, provided that the premises were 'privileged to be occupied for hazardous or extra-hazardous purposes.' Held, that there was an inconsistency or want of harmony between the printed and written part of the policy, and that the latter must control; also that the use of the premises as a paint factory, in which benzine and gasoline were kept and used

in the manufacture of paints, was permitted by the written part of the policy."

Sol Smith Russell v. Manfg. & Bldrs. Fire Ins. Co. of N. Y., 50 Minn. 409.

The policy provides that extra hazardous use may be made of the building insured without the policy being affected, for it is provided that the effect of the policy will be suspended in the event the hazard be increased by means within the control or knowledge of the insured. If the insured were ignorant of it, although it was a matter which she might have controlled had she known it, the policy is not affected. Or, although she knew of it, yet if it was a thing beyond her control, neither is it affected. Such seems to be the reasonable construction of the language as setting forth the intention of the parties.

North British Ins. Co. v. Union Co., 87 S. W. (Ky.) 285.

The use of prohibited articles or the keeping or storing of them must be permanent or habitual in order to violate a policy prohibiting them.

Swift v. Patrons Ins. Co., 125 Me. 255, 132 Atl. 745.

Where the policy provides that this entire policy unless otherwise provided by agreement indorsed hereon or added hereto, shall be void . . . . if there be kept, used or allowed on the above-described premises . . . gasoline and that it is understood . . . that any such breach or violation shall not be considered as avoiding the policy or any part thereof unless such breach or

violation has contributed to bring about the destruction of the property hereby insured,' the liability of the insurer thereunder resulting from a fire caused by gasoline on the premises is not defeated unless the gasoline was kept, used, or allowed upon the insurd premises with some degree of permanency, as distinguished from a mere casual deposit or a mere temporary bringing of the gasoline on the premises.

19 Cyc. 736,
Springfield Fire & Marine Ins. Co. v Wade (1902) 95 Tex. 598,
68 S. W. 977,
58 L. R. A. 714,
93 Am. St. Rep. 870,
London & Lancashire Fire Ins. Co. v. Fisher,
92 Fed. 500,
34 C. C. A. 503,
14 R. C. L. 1111,
13 Ann. Cas. 532,
19 Ann Cas. 419.

"It was therefore error to charge that 'where the loss by fire of the property insured directly resulted from a temporary violation of a condition in a policy of insurance such as keeping, using or allowing gasoline or other inflammable material on the premises, the insurer would not be liable."

Sandersville Oil Mill Co. v. Globe Ins. Co.,
124 S. E. 728,
32 Ga. (App.) 722.

Defendant's other instructions refused are bad for the same reasons above mentioned as to the refusal of the petitioner's instructions No. 1. In addition there

is no evidence to support the statement therein contained that some other person or persons by and with the knowledge and consent of the tenant Varisca, kept, used or allowed gasoline upon the premises for the purpose of operating moonshine stills or for any other purpose not permitted by the policy.

"DEFENDANT'S INSTRUCTION NO. 1-B (R. 148)", REFUSED.

In addition to the reasons given under defendant's instruction No. 1, this instruction is bad because there is not a scintilla of evidence to show that some other person or persons by and with the knowledge and consent of Bill Varisca, kept, used or allowed gasoline upon the insured premises. There is no evidence that the respondent consented to use of or had knowledge that said Bill Varisca kept or used gasoline upon said premises and there is absolutely no evidence that respondent had knowledge or consented to some other person or persons to keep, use or store gasoline upon said premises as suggested in said instruction.

"DEFENDANT'S INSTRUCTION NO. 3." (R. 150), REFUSED.

In addition to other reasons given, under Instruction No. 1 and petitioner's other instructions previously referred to for refusing it, instruction No. 3 (R. 150) singled out and emphasized the fact that gasoline alleged to have been kept, used or allowed on said premises, need not have caused or contributed to the fire in question. It is not error to refuse an instruction which singles out particular circumstances and omits all reference to others of importance.

Grand Trunk R. Co. v. Ives 144 U. S. 408.
Rio Grande Western R. Co. v. Leak 163 U. S. 280.

The singling out of a particular matter and emphasizing it by a special instruction is apt to mislead the jury.

Vertovich v. U. S. 205 U. S. 86, 92.

An instruction which singles out and causes undue prominence to be given a particular item of evidence, is improper.

Richelieu etc. Nav. Co. v. Boston Marine and Ins. Co. 136 U. S. 408, 423;
Hickory vs. U. S. 160 U. S. 408.

"DEFENDANT'S INSTRUCTION NO. 4 (R. 150)", REFUSED.

This instruction is bad and the Court properly refused it for the following reasons:

1. It entirely ignores the rider attached to the original policy permitting the use of gasoline.

2. It would tell the jury that the said policy was forfeited by keeping or using of gasoline upon said premises, when as a matter of fact, said policy does not provide for a forfeiture in any event.

3. It would tell the jury that the Insurance Company was not liable for loss, even though a stranger or a trespasser was keeping, using or allowing gasoline upon the insured premises without the knowledge or notice of its presence by the respondent or her agent, Charles F. Bachmann.

4. Said instruction is contrary to the issues raised in its specifications of defense.

PETITIONER'S INSTRUCTION NO. 6 (R. 150) REFUSED.

This instruction is bad for the following reasons:

1. It entirely ignores the rider attached to the original policy permitting the use of gasoline.

2. It incorporates in said instruction alleged facts upon which there is not a scintilla of evidence, to-wit: That the petitioner would not be liable though neither the respondent nor her husband had any interest in said stills and though they had not in any way whatever participated in the purchase, use or operation thereof.

3. This instruction is bad not only because it singles out certain facts but it actually assumes facts upon which there is no evidence to support, and facts which the petitioner does not even suggest as existing nor attempts to prove.

The record may be searched from beginning to end and it will not show any fact or circumstance from which any inference can be drawn that the respondent or her husband had any interest in said stills "or, had in any way, whatever, participated in the purchase, use or operation thereof."

Petitioner, in its brief, complains that the refusal of its Instruction No. 6, coupled with the granting of Respondent's Instructions Nos. 1 and 2, requires the petitioner to establish its specifications of defense by showing actual knowledge on the part of the respondent or her agent, of the operation of the stills. It is necessary by the terms of the policy itself to show that the respondent had actual knowledge or control of any

alleged increased fire hazard. Actual knowledge is divided into two classes, express and implied. Bouvier Law Dictionary, Vol II, P. 515. Plainly this is what the Court means by the terms "actual knowledge."

DEFENDANT'S INSTRUCTION NO. 7 (R. 151) REFUSED

Petitioner's Instruction No. 7 given, tells the jury that it was not incumbent upon the petitioner to prove beyond a reasonable doubt that the respondent or her husband, Charles F. Bachmann, had knowledge or notice of any condition prevailing in the insured building as alleged in petitioner's specifications of defense, at and prior to the time of the fire, which may have increased the fire hazard to the insured premises. The word "notice" as used in petitioner's instruction No. 7 is very comprehensive and applies to issues raised and evidence adduced.

"Notice" as used in petitioner's instruction No. 7, in connection with the word "knowledge" means that information given of some act done or the interpellation by which some act is required to be done, and includes actual or constructive notice. In every instruction granted, either on behalf of the petitioner or the respondent, the Court permits the extending of constructive notice to the plaintiff, by imputing notice or knowledge of her agent, Charles F. Bachmann, to her. Petitioner's Instruction No. 2 granted, especially contains this provision.

Petitioner complains in its brief because the Court below did not properly define to the jury the meaning of the words "within the control or knowledge of the insured," as used in the Increase of Hazard warranty.

There was no request made by the petitioner for the interpretation of these words by the Court, nor was any such assignment of error made, on motion for new trial.

(f) SUMMARY OF PETITIONER'S EXCEPTIONS TO COURT'S RULING IN REFUSING TO GRANT ITS INSTRUCTIONS HEREINBEFORE MENTIONED.

First. Petitioner's refused instructions predicated on an increase of fire hazard tell the jury that notice or knowledge of such increase of fire hazard on the part of respondent, or her agent, Charles F. Bachmann, was NOT NECESSARY OR ESSENTIAL; while Petitioner's Specification of Defense with reference to the same subject matter, i. e., increase of fire hazard (R. 12) charged and averred full notice and knowledge to respondent and/or her agent, Charles F. Bachmann, of such increase of fire hazard, besides the policy itself requires that it be within control and knowledge of the insured. The petitioner has no right to mislead the Court or counsel in its pleadings; nor has it any right to depart from its pleadings after the testimony is all in.

Second. With reference to the presence of gasoline, mash, etc., on the insured premises, the Petitioner's Specifications of Defense under the title "Conditions and Warranty" charges the presence of gasoline, mash, etc., on the insured premises, "all of which was well known to respondent and her agent or agents." Petitioner's refused instructions are predicated upon the proposition that it mattered not whether the respondent or her agents had any knowledge whatever concern-

ing such condition; again departing from the petitioner's pleading upon which it depended to evade or absolve itself from liability.

Third. The insured premises originally carried a certain percentage of risk and fire hazard. An increase of risk was contemplated and was permitted by the "rider" issued and attached to the face of the policy. The evidence shows that gasoline was used by means of a "hot plate" under the permission and authority of said rider; and that hot plates were found in the building after the fire; therefore, ignoring and failing to recognize or mention the use of gasoline by a hot plate in petitioner's instructions, practically a controlling feature of the case, made all the instructions bad.

Fourth. Practically every instruction which calls upon the jury to determine some phase based upon the evidence, facts and circumstances of the case, there is no testimony to support the theory set forth in the denied instructions.

Fifth. The defenses of the petitioner as expressed and described in its Specifications of Defense have been fully covered by Instructions Nos. 2, 5 and 7. No. 7 is particularly called to the Court's attention, and especially in view of the refusal of the petitioner's Instruction No. 6. While No. 6 speaks of the stills increasing the fire hazard whether by explosion or otherwise, and whether the respondent or her agent knew or had reasonable cause to believe or know of the existing condition, petitioner's No. 7 which was allowed goes far beyond No. 6. No. 7 covers the entire field of defense in using the language "had knowledge or NOTICE of any condition prevailing in the insured building, as alleged in Petitioner's Specification of Defense, at and prior to the time of the fire which may

have increased the fire hazard in the insured premises." No. 7, therefore, included within its scope "Petitioner's Specifications of Defense" in their entirety.

(g) OTHER ASSIGNMENTS OF ERROR.

A reference to petitioner's brief page 20, under "Specifications of errors to be urged," it will be seen that petitioner abandons all other errors urged by it in the Circuit Court of Appeals.

(h) CASES RELIED ON BY PETITIONER DISTINGUISHED FROM CASE AT BAR

The cases of Liverpool and London and Globe Ins. Co., vs. Gunther, 116, U. S. 113, and Gunther vs. Liverpool and London and Globe Ins. Co., 134 U. S. 110 are distinguishable from the case at bar (1) both in respect to the respective provisions of the policy relating to the keeping, storing and using of gasoline and as to the facts proved; (2) the Gunther case, also, is distinguishable from the case at bar as to the issues raised by the pleadings and determined by the jury; (3) in the Gunther case, the insurance company, as in the case at bar, admitted the execution of the policy and the fact of the destruction by fire of the insured premises, and denied generally all the allegations of the complaint, not expressly admitted or otherwise controverted in the answer, and for a separate and distinct answer to the causes of action alleged in the complaint, in addition to the general denial above referred to, alleged and set out warranty contained in the policy, which warranty provided that "if the assured shall keep gunpowder, . . . gasoline, benzine,

benzole, . . . or any burning fluid, . . . without written permission in this policy, then and in every such case, this policy shall be void", and further provided that none of the above mentioned prohibited articles were to be stored, used, kept, or allowed on the above premises, temporarily or permanently, for sale or otherwise, unless with the written permission endorsed on the policy, "excepting the use of refined coal, kerosene, or other carbon oil for lights, if the same is drawn and the lamps filled by daylight; otherwise this policy shall be null and void." Then there follows an allegation of the breach of said warranty in the following words:

"And the defendant avers that the said conditions of insurance were broken and violated on the part of the plaintiff, among other things, in that without written permission of the defendants, indorsed on said policies or otherwise, there were stored, used, kept, and allowed on the insured premises mentioned and described in said policies, benzine or benzole, or other inflammable fluids or liquids, prohibited by said policies, and defendant avers that the fire mentioned and referred to in the complaint originated and was caused by such storing, using, keeping, and allowing of such prohibited articles on said insured premises, and defendant avers that it is advised and believes that, by reason of the premises, the policies became and were null and void."

"Each of the two policies, after the description of the premises insured, contained the following clause: 'Privilege to use gasoline, gas, gasometer, blower and generator being underground about 60 feet from main building, in vault; no heat employed in process'."

(4) In the Gunther case, the prohibited warranty clause provided against the storing, using or keeping of gasoline on the premises TEMPORARILY or permanently,—in the case at bar, there is no provision against taking gasoline upon the premises TEMPORARILY and the keeping of it is permitted by the rider; (5) in the Gunther case, the policy provides that if any of the prohibited articles are stored, kept, used or allowed upon the premises, the policy shall be void,—in the case at bar, even the original policy does not provide that using, storing or keeping of any of the prohibited articles mentioned shall render the policy void, but that the company shall be not liable for loss or damages occurring while any of the prohibited articles are kept, used or allowed upon the insured premises; (6) in the Gunther case, the policy did not provide for suspension of the operation of the policy, or for the avoiding of it, because of an increase of the fire hazard by any means within the control or knowledge of the assured,—in the case at bar, the policy contained such a provision; (7) in the Gunther case, the insurance company averred that the using, keeping and allowing on the insured premises described in the policy, of the prohibited articles, the policies became void, but did not allege that the keeping of said prohibited articles was within the knowledge and control of the insured as is alleged in the case at bar; (8) in the Gunther case, the court says that the allegations of the answer were not so definite and certain as might have been required, upon motion made in due time, and that there was some obscurity in pleading the defense but whatever obscurity there was, consideration apart from the facts subsequently disclosed in the evidence that all the testimony necessary to its establishment was offered

and admitted without objection and that, therefore, the assured was not misled by said pleading, in any event, that if Gunther had desired more specific pleading, he should have made timely objection to the answer filed by the insurance company,—in the case at bar, the insurance company sets up in its specifications of defense that at the time of the fire complained of, and prior thereto, large quantities of gasoline and other explosives were being kept, used and allowed upon and about the insured premises, all of which was well known to the plaintiff below and her agent or agents, and was in violation of the conditions and warranty contained in said policy. (R. p. 14), and upon the pleadings tendered and filed on behalf of the insurance company, the court below based all of the instructions given to the jury and, also, permitted certain evidence to be introduced on behalf of both plaintiff and defendant, and refused to permit certain other testimony to be admitted (R. p. 141); (9) in the Gunther case, there was no question about the gasoline being kept upon the insured premises,—in the case at bar, the keeping or using of gasoline is contradicted by a great many witnesses and by surrounding facts and circumstances; (10) in the Gunther case, the evidence clearly showed that the manager of the hotel was in no sense a stranger or a trespasser, while in the case at bar, the evidence does not show clearly by whom the gasoline was kept, used or allowed upon the premises, if at all, but from the testimony of W. L. Smith, offered by the insurance company, it would seem that there were no stills, gasoline or other prohibited articles upon the insured premises a short time prior to the fire; (11) in the Gunther case, the use of gasoline was restricted and limited to the use thereof for fuel, which was to be

kept in a place and manner specifically prescribed,—in the case at bar under the rider, clause (d) contained in the original policy prohibiting the use of gasoline on said premises is materially changed so as to permit the use of gasoline for any purpose that would not increase the fire hazard with the consent or knowledge of respondent.

There are a great many other distinctions between the Gunther case and the case at bar, but we deem the above sufficient to clearly distinguish the two cases.

The case of Miller vs. Union Assurance Society, 39 Fed. (2d 25) cited by the petitioner in its brief at pages 22, 24, 26, 28, 44 and 62, was a suit in Equity for recovery from the owner of the building under and by virtue of an assignment of the interest of the mortgagor to said Insurance Company and for decree of foreclosure under said mortgage against the property of the insured. In that case the policy reserved to the occupant the right to use "the premises as is usual and incidental in the business as conducted thereon when not in violation of any law."

In the case at bar, there is no provision against conducting an unlawful business either in the original policy or in Form No. 4, Substituted Form (commonly called a "rider"). (R. 3.) In the Miller case, the Court of Equity held that the insured had knowledge of the increase in the fire hazard. In the case at bar, this question is submitted to the jury under both respondent's instructions and petitioner's instructions Nos. 2, 5 and 7, and the jury decided the fact as to whether respondent or her agent had knowledge adversely to the petitioner. In the Miller case the Court sitting as a Court of Equity, found the fire hazard was increased with the knowledge and control of the in-

sured. In the case at bar, the jury found that the fire hazard was not increased within the knowledge and control of the respondent or her agent.

Furthermore, the "work and materials clause" in the Miller case very materially differs from the "work and materials clause" in the present case. In the Miller case, the "work and materials clause" reserved to the occupant the right to use

> "the premises as is usual and incidental to the business . . . as conducted therein . . . WHEN NOT IN VIOLATION OF ANY LAW." (Caps ours.) MILLER v. UNION ASSURANCE SOCIETY, 39 Fed. (2) 25, p. 30.

The "work and materials clause" in the present case contained no provision RELATIVE TO THE VIOLATION OF ANY LAW. This clause, in the present case, is as follows:

> "And FOR PRESENT AND OTHER OCCUPANCIES NOT MORE HAZARDOUS and to do such work and to keep such materials as are usual in such occupancies." (R. p. 3.) (Caps ours.)

The Miller case held that the storing and using of gasoline on the premises could not be justified or excused under the "work and materials clause" in that policy, because this clause in the policy contained a provision that the business conducted on the premises WAS NOT TO BE IN VIOLATION OF ANY LAW.

The court said in the Miller case, 39 Fed. (2) 25 on page 30:

"obviously and admittedly, the materials were used in violation of law as the premises were being used not only to violate the prohibitory laws of the Government but the revenue law as well."

If a fire insurance policy contains no express prohibition of illegal use such use by a tenant without the knowledge or consent of insured will not violate the policy.

BEHLER v. GERMAN MUTUAL FIRE INS. CO. 68 Ind 347.

MARTIN v. CAPITOL INSURANCE CO. 85 Ia. 643, 52 N. W. 534.

NEBRASKA INSURANCE CO. v. CHRISTENSEN 29 NEB. 572, 45 N. W. 924.

There being an express prohibition of illegal use in the "work and materials clause" in the Miller case, and no express prohibition of illegal use in the "work and materials clause" in the present case, it can very readily be seen that there is no conflict between the decision of the Circuit Court of Appeals of the Eighth Circuit in the Miller case and the decision of the Fourth Circuit Court of Appeals in the present case.

CONCLUSION

We respectfully submit in conclusion that the petitioner, the defendant below, had a fair trial and that the case was fairly and properly presented to the jury for its consideration upon the issues joined, and the instructions of the Court which were eminently proper.

The jury found for the respondent, the plaintiff below, and judgment was accordingly rendered on the verdict as found. On appeal to the Circuit Court of Appeals (4th Circuit), the judgment of the lower Court was affirmed. We respectfully submit that for the reasons hereinbefore set out, that the judgment of the Circuit Court of Appeals should be affirmed.

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